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In The

Supreme Court of the United States

October Term, 1983

LANDMARK BEEF PROCESSORS, INC.,
CHAIM TREIBATCH,

Petitioners,

vs.

JOHN BLOCK, the Secretary of
Agriculture, United States
Department of Agriculture,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

HARRISON W. HERTZBERG
MICHAEL B. MARGOLIS
Counsel of Record
KAREN MOSKOWITZ
HERTZBERG, REGELE & HERTZBERG
A Partnership Including
A Law Corporation
3550 Wilshire Boulevard
Suite 1418
Los Angeles, California 90010
(213) 381-1121

Attorneys for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

QUESTIONS PRESENTED

1. Does Article III prohibit the Secretary of Agriculture from adjudicating private contract rights between agricultural debtors and creditors?

2. Do administrative proceedings in which private contract rights are adjudicated without possibility of jury trial violate the Seventh Amendment?

3. Can Congress rescue juryless administrative proceedings from the Sixth Amendment by characterizing penalties as civil without regard to the enormity of the punishment?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

I

JURISDICTION

Landmark Beef Processors, Inc.[1] and Chaim Treibatch ("Petitioners") seek review of the Ninth Circuit Court of Appeals' denial, by order filed on March 10, 1984,

1. Pursuant to this Court's Rule 28.1, Petitioner Landmark Beef Processors, Inc. states that it has no affiliates or subsidiaries and is itself wholly owned by Landmark Management Company.

of Petitioners' application for a writ of prohibition to terminate administrative proceedings before the United States Secretary of Agriculture. Jurisdiction of this petition is grounded on 28 U.S.C. §§ 1254(1), 2101(e).

II

CONSTITUTIONAL PROVISIONS INVOLVED

A. United States Constitution, Article III, Section 1.

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

B. United States Constitution, Article III, Section 2, Clause 3.

> The Trial of all Crimes, except in cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

C. United States Constitution, Amendment VI.

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by

law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

D. United States Constitution, Amendment VII.

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

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III

STATEMENT OF THE CASE

The Secretary of Agriculture ("Secretary") filed an administrative Complaint against Petitioners on July 26, 1983.[2] The Complaint alleges that Petitioners engaged in fifty-three separate "unfair or . . . deceptive practice[s]" within the meaning of Section 202(a) of the Packers and Stockyards Act of 1921, 7 U.S.C. § 192(a),[3] by "purchas-

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2. This Complaint is reproduced in the Appendix at App. 2 - App. 8. Petitioners filed answers that denied the existence of undischarged debts and raised the constitutional challenge as an affirmative defense.

3. 7 U.S.C. § 192(a) provides:

> It shall be unlawful with respect to livestock, meat food products, livestock products in unmanufactured form, poultry, or poultry products for any packer or any like poultry dealer or handler to:
>
> (a) Engage in or use any unfair, unjustly discriminatory, or deceptive practice or device[.]

[ing] meat and meat food products and fail[ing] to pay, when due, the full purchase price for such meat and meat food products" on fifty-three separate occasions. *See* Appendix at App. 4 - App. 7.

The dispositive factual issue presented by each claimed violation is whether Petitioners did in fact fail to pay the various meat vendors for goods received.[4]

The Complaint is the first step in an administrative proceeding in which this factual issue will be resolved, after an evidentiary hearing, by an administrative law judge. *See* 7 C.F.R. § 1.141. For every instance of Petitioners' failure to honor a contractual obligation to a vendor, the administrative law judge could assess a "civil penalty" of ten thousand dollars. 7 U.S.C. § 193(b). Apart from limited review in a court of appeals, the administrative law judge's decision, once approved by the Secretary, is "final and conclusive". *Id.* § 194(a).

Thus, the administrative law judge would adjudicate the private contract rights between Petitioners and the meat vendors. Petitioners saw this as unconstitutional inasmuch as neither a jury nor an Article III judge would be available. Regulations precluded Petitioners from raising this point at the outset of the administrative proceed-

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4. The Secretary considers nonpayment of debt, even standing alone, to be a deceptive practice within the meaning of 7 U.S.C. § 192(a). *See, e.g., In Re Rosenthal,* 36 Agric. Dec. 210, 220-21 (1976); *In Re American Kosher Provisions, Inc.,* 28 Agric. Dec. 1248, 1253 (1969).

ings themselves,[5] so they asked the Ninth Circuit Court of Appeals, as the court with appellate jurisdiction over the proceedings, to terminate the agency's action.[6]

The Ninth Circuit declined, *see* Appendix at App. 1, but this Court should not because permitting the administrative proceedings to continue would violate three distinct constitutional principles. First, the Secretary of Agriculture would adjudicate private rights reserved by the Constitution to Article III judges. Second, Petitioners would lose their Seventh Amendment right to a jury trial of the debt nonpayment issue. Finally, exposing Petitioners to "civil penalties" of over $500,000.00 each without a jury trial cannot be reconciled with the Sixth Amendment.

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5. The regulations that govern the administrative proceedings are set forth at 7 C.F.R. §§ 1.130-1.151. Section 1.143 (b) provides that "[a]ny motion will be entertained other than a motion to dismiss on the pleading." Since Petitioners' view would divest the agency of jurisdiction, dismissal would be their only remedy. Administrative exhaustion is not, therefore, a factor in this case. *Cf. Public Utilities Commission v. United States*, 355 U.S. 534, 540 (1958) ("where the only question is whether it is constitutional to fasten the administrative procedure onto the litigant, the administrative agency may be defied and judicial relief sought as the only effective way of protecting the asserted constitutional right").

6. 7 U.S.C. § 194(a) gives the courts of appeals appellate jurisdiction over administrative orders arising under the Packers and Stockyards Act. The All Writs Statute therefore authorized the Ninth Circuit to issue a writ of prohibition in an appropriate case. *See* 28 U.S.C. § 1651(a); *Finley v. Chandler*, 377 F.2d 548 (9th Cir), *cert. denied*, 389 U.S. 869 (1967).

IV

REASONS FOR GRANTING THE WRIT

A. Article III.

Colonial America excoriated the King of Great Britain for having "made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries." Declaration of Independence, para. 11 (U.S. 1776). Our Constitution's Article III guards against a repetition of this tyranny by vesting "[t]he judicial Power of the United States" exclusively in judges who enjoy life tenure and fixed emolument. U.S. Const. art III, § 1.

The Court has defended these indicia of independence against all dilution. *E.g., United States v. Will,* 449 U.S. 200 (1980). This Court has also taken care that the nation's judicial power not be exercised by persons who lack the Article III attributes essential to judicial independence. *E.g., Northern Pipeline Construction Co. v. Marathon Pipe Line Co.,* 458 U.S. 50 (1982).

Balanced against the Article III principle is Congress' power to "create adjudicative institutions designed to carry out federal policy established pursuant to the substantive authority given Congress elsewhere in the Constitution." *Id.* at 93 (White, J., dissenting). Thus are born the so-called "legislative" courts, such as the administrative agency that Petitioners face in the case at bar.

These principles—separation of powers and congressional discretion—clash when a legislative court exercises jurisdiction over matters traditionally reserved to the judiciary. Knowing where to strike the balance is not easy,

and many courts, including perhaps the Ninth Circuit below, are understandably reluctant to address the issue. This Court itself has been unable to find an analytical approach acceptable to a majority of Justices.

Northern Pipeline is illustrative. Northern Pipeline Construction Co. filed a petition for reorganization with a United States bankruptcy court established pursuant to the Bankruptcy Reform Act of 1978. After the bankruptcy court took jurisdiction, Northern Pipeline brought an action against Marathon Pipe Line Co. which included claims for breach of contract, breach of warranty, misrepresentation, coercion and duress. A majority of this Court agreed with Marathon that the bankruptcy court ran afoul of Article III when it exercised jurisdiction over Northern Pipeline's lawsuit.

But no majority agreed on why. In the plurality opinion, Justices Brennan, Marshall, Blackmun and Stevens ruled that legislative courts obey Article III only when they confine their reach to three narrow areas: the District of Columbia and United States territories, courts martial, and public as opposed to private rights. *Id.* at 63-69. The concurrence of Justices Rehnquist and O'Connor eschewed such broad strokes, holding only that if Article III prohibits anything it prohibits a legislative court's adjudication of private contract rights or other matters "which are the stuff of the traditional actions at common law tried by the courts at Westminister in 1789." *Id.* at 90-91. Dissenting Justice White, joined by the Chief Justice and Justice Powell, rejected both approaches in favor of case-by-case balancing of Article III values against "the values Congress hopes to serve through the use of Article I courts." *Id.* at 115.

While the *Northern Pipeline* schism may not help a lower court to analyze a new Article III challenge, the lune formed by coupling the plurality and the concurrence unambiguously delineates one function that a legislative court cannot lawfully perform: adjudication of private contract rights.[7] It is precisely this prohibited function which the administrative agency below will perform if the Court does not intervene.

This may not be immediately apparent. On the face of it, the Secretary of Agriculture is attempting to adjudicate only whether Petitioners have engaged in deceptive practices within the meaning of 7 U.S.C. § 192(a). The United States government, not a private party, is prosecuting the action, and the remedy sought is a civil penalty rather than money damages. The Secretary will surely argue that this is a matter of public rights and therefore exempt from Article III's constraints.

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7. *Compare id.* at 70 n.25 (Brennan, J., plurality) ("[w]hat clearly remains subject to Art. III are [sic] all private adjudications . . . [i.e.] matters from their nature subject to 'a suit at common law or in equity or admiralty' ") *with id.* at 90-91 (Rehnquist, J., concurring) (Article III includes at least a lawsuit that "seeks damages for breach of contract, misrepresentation, and other counts which are the stuff of traditional actions at common law tried by the courts at Westminster in 1789") *and id.* at 94 (White, J., dissenting) (rule of decision is that, if a controversy "arises out of state law, it may only be adjudicated, within the federal system, by an Article III Court"). The notion that private contract rights are exclusively for the judiciary to determine is not, of course, a new one. *See Murray's Lessee v. Hoboken Land & Improvement Co.*, 18 How. 272, 284 (1855).

But this mask is easily torn.[8] The public rights/private rights distinction lies deeper than the identity of the plaintiff or the remedy's name. The pith of the distinction is in its roots:

> [W]e do not consider congress can either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or in admiralty. . . . At the same time there are matters, including public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States as it may deem proper.

Murray's Lessee v. Hoboken Land & Improvement Co., 18 How. 272, 284 (1855). The "liability of one individual to another under the law" being a creature of common law, is a matter of private rights. *Crowell v. Benson*, 285 U.S. 22, 51 (1931).

Liability of one individual to another is the very heart of the administrative case below. Nominally at issue is whether deceptive practices occurred within the meaning

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8. The thinness of the facade is not the Secretary's only problem; it may also be that to escape from Article III he must show more than the public nature of the rights involved. The configuration of the *Northern Pipeline* opinions leaves us less certain aobut what satisfies Article III than about what does not. Although Justices Brennan, Marshall, Blackmun and Stevens agreed that a case involving public rather than private rights may properly be adjudicated by a legislative court, *see id.* at 69-70, Justices Rehnquist and O'Connor were noncommittal about whether that distinction is dispositive, *see id.* at 91, and the dissenting Justices appeared to reject it entirely as a basis for deciding Article III challenges, *see id.* at 109-10. Thus, while determining that a case involves private rights would eliminate legislative court jurisdiction, determining the contrary is not necessarily sufficient to establish such jurisdiction.

of 7 U.S.C. § 192(a), but the adjudicating side of the Secretary of Agriculture operates on the view that failure to pay on a meat purchase order qualifies as a deceptive practice. *See, e.g., In Re Rosenthal,* 36 Agric. Dec. 210, 220-21 (1976); *In Re American Kosher Provisions, Inc.,* 28 Agric. Dec. 1248, 1253 (1969). The Secretary's prosecutorial arm agrees; the sole substantive allegation contained in the Complaint is that Petitioners bought meat from private vendors but did not pay them.[9] No debt, no violation.

It is obvious that, unless this Court steps in, the Secretary of Agriculture will adjudicate whether Petitioners owe money to certain meat vendors. Adjudicate, in other words, private contract rights—the very thing that caused the demise of the bankruptcy courts.

Northern Pipeline can be distinguished from the case at bar only to the extent that the Secretary of Agriculture can exploit the statutory prohibition of deceptive practices to camouflage his intrusion into private contract law. The Secretary's argument would run like this: Although the common law knew the nonpayment of debt issue as

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9. Paragraph II(a) of the Complaint states that, "on or about the dates and in the transactions set forth below, [Petitioners] purchased meat and meat food products and failed to pay, when due, the full purchase price for such meat and meat food products." Appendix at App. 5. What follows in the Complaint is a list showing the date, size, price, and vendor for each of fifty-three transactions. *Id.* at App. 5 - App. 7. Paragraph II(b) says that, "[a]s of June 17, 1983, there remained unpaid in excess of $1,775,000.00 for meat and meat food products purchased by" Petitioners. *Id.* at App. 7. Paragraph III concludes that, "[b]y reason of the facts alleged in paragraph II, [Petitioners] have wilfully violated Section 202(a) of the [Packers & Stockyards] Act (7 U.S.C. §192(a))." *Id.* at App. 7.

assumpsit,[10] Congress has decreed in the Packers & Stockyards Act (as interpreted by the Secretary) that it also be known as a deceptive practice; since deception in agricultural trade plainly is an appropriate subject for congressional regulation, the Secretary must be able to determine the debt issue in particular cases without Article III interference.

This madness knows no limiting principle. No part of this nation's judicial power is safe from congressional usurpation if private wrongs can be made public simply by nomenclatural legerdemain.

Allowing the Secretary to proceed below would be disastrous for Petitioners individually as well as for our constitutional separation of powers. Labels aside, the facts that will be adjudicated in the administrative proceeding are precisely the same as would be adjudicated were the meat vendors to bring civil actions for breach of contract. This puts Petitioners in a no-win situation. If the Secretary should judge that Petitioners owe no debt, the meat vendors could still sue independently because, as non-parties to the administrative proceeding, they would not be bound by the Secretary's decision. *See Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation,* 402 U.S. 313, 329 (1971). *Cf. Town of Lockport v. Citizens for Community Action,* 430 U.S. 260, 263 n.7 (1977) (individuals not precluded from suit by earlier unsuccessful suit by government on same claim). On the other hand, should the Secretary rule that Petitioners did fail to pay on their purchase orders, the meat vendors

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10. *See generally* O. W. Holmes, Jr., *The Common Law* 283-88 (1881).

would be fools not to sue, for they would very likely be entitled to use the administrative decision to collaterally estop Petitioners on the dispositive facts in a breach of contract action.

This is the teaching of *Parklane Hosiery Co., Inc. v. Shore,* 439 U.S. 322 (1979). Certain stockholders brought a federal class action against the corporation, its officers and its directors, seeking damages in connection with an allegedly fraudulent proxy statement. Before trial of that action, the Securities and Exchange Commission ("SEC") brought an independent federal action for injunctive relief for the same claim against the same defendants. The SEC prevailed, and the private plaintiffs then attempted to use the decision in that case as collateral estoppel in their separate action. This Court approved the offensive use of collateral estoppel.[11]

Parklane Hosiery differs from the case at bar in that the first proceeding was a civil action in federal court. But this difference does not help Petitioners, because "[w]hen an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply *res judicata* to enforce repose." *United States v. Utah Constr. & Mining Co.,* 384 U.S. 397, 422 (1966).

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11. The Court acknowledged that offensive use could be inappropriate in certain circumstances, such as where the party seeking preclusion could have joined in the original action, the defending party lacked an adequate incentive to litigate the issues vigorously in the prior action, or the second action would present procedural opportunities not available in the first action which could lead to a different result. *Id.* at 331-32.

The reality is, therefore, that if allowed to proceed, the Secretary of Agriculture will leave nothing for the judiciary to adjudicate in a breach of contract action between Petitioners and the meat vendors.[12] If this does not count as "withdraw[ing] from judicial cognizance [a] matter which, from its nature, is the subject of a suit at the common law," *Murray's Lessee v. Hoboken Land & Improvement Co.*, 18 How. at 284, it is hard to see what would.

B. The Seventh Amendment.

A similar concern for substance over form informs Petitioners' invocation of the Seventh Amendment.

This Court staked out its position on Seventh Amendment challenges to administrative factfinding in *Atlas Roofing Co., Inc. v. Occupational Safety and Health Review Commission*, 430 U.S. 442 (1977). Two employers in separate cases were cited by the Secretary of Labor for violations of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.*, which had created a new statutory duty to avoid safety hazards in the workplace. 430 U. S. at 444-45. Administrative hearings resulted in the employers being assessed civil penalties, and the employers sought judicial review in part on Seventh Amendment grounds.

Two Courts of Appeals rejected the constitutional challenge in the belief that *Curtis v. Loether*, 415 U.S. 189 (1974), and *Pernell v. Southall Realty*, 416 U.S. 363 (1974),

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12. Unless, of course, Petitioners were to prevail before the Secretary, in which case the common law would be available to the vendors for a second bite of the apple.

established that the Seventh Amendment simply does not apply where Congress has assigned a factfinding function to an administrative agency. 430 U.S. at 448.[13] This Court affirmed without going as far as the Courts of Appeals; the Court held only that, "when Congress creates new statutory 'public rights,' it may assign their adjudication to an administrative agency with which a jury trial would be incompatible, without violating the Seventh Amendment's injunction that jury trial is to be 'preserved' in suits at common law.'" 430 U.S. at 455. Where private rights enforceable in common law actions are involved, on the other hand, the jury trial guarantee does apply even if Congress has attempted to place factfinding responsibility in an administrative agency. *Id.* at 450 n.7; *see id.* at 461 n.16.

Thus, *Atlas Roofing* makes the Seventh Amendment question turn on whether private rights would be adjudi-

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13. The Fifth Circuit held that, "[w]here adjudicative responsibility rests only in the administering agency, 'jury trials would be incompatible with the whole concept of administrative adjudication and would substantially interfere with the [agency's] role in the statutory scheme.'" *Atlas Roofing Co. v. Occupational Safety and Health Review Commission*, 518 F.2d 990, 1011 (5th Cir. 1975) (quoting *Curtis* and citing *Pernell*). The Third Circuit declared that "[t]he Supreme Court's rulings to date leave no doubt that the Seventh Amendment is not applicable, at least in the context of a case such as this case, and that Congress is free to provide an administrative enforcement scheme without the intervention of a jury at any stage." *Frank Irey, Jr., Inc. v. Occupational Safety and Health Review Commission*, 519 F.2d 1200, 1218 (3d Cir. 1975). The Third Circuit expressly relied on *Curtis* and *Pernell*. *See id.* at 1219 n.9.

cated in the administrative proceedings.[14] As we have shown, if allowed to proceed, the Secretary of Agriculture definitely will adjudicate Petitioners' private contract rights vis-a-vis the meat vendors. The Seventh Amendment and *Atlas Roofing* therefore require that the Secretary not be permitted to proceed.

The best counter-argument available to the Secretary is to rely on the Seventh Amendment's promise only to "preserve" the right to jury trial as it existed at common law. The Secretary might say that, even though the administrative agency below, would engage in factfinding on the same issues as would be involved in a breach of contract action between Petitioners and the meat vendors, the administrative proceeding is concerned exclusively with a public legal significance to those facts which is newly created by statute. Thus, the common law right to jury trial is preserved because, should the meat vendors bring a civil action for breach of contract, Petitioners may have their jury trial at that time.

The fallacy in this argument is revealed by *Parklane Hosiery*. The Court there held that the Seventh Amend-

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14. *Atlas Roofing* did not use the historical analysis traditionally employed by this Court in Seventh Amendment cases, and this difference in approach may have led to a result that could not have been reached under the traditional analysis. *See generally* Kirst, *Administrative Penalties and the Civil Jury: The Supreme Court's Assault on the Seventh Amendment*, 126 U. Pa. L. Rev. 1281 (1978). In the case at bar, the difference in approach makes no difference in result. The traditional approach would find in favor of Petitioners' Seventh Amendment challenge inasmuch as the essence of the administrative proceeding is whether a contract was breached and a debt owed. *See, e.g.*, 5 J. Moore, *Moore's Federal Practice* ¶ 38.11[5] (2d ed. 1948). As is shown below since private rights are at stake in the administrative adjudication, the *Atlas Roofing* analysis agrees.

ment was not violated by giving collateral estoppel effect to a prior equitable judgment in a subsequent legal action. This appeared to the Court to be a logical extension of *Beacon Theatres, Inc. v. Westover,* 359 U.S. 500 (1959), which had recognized that, where a single action contained both legal and equitable claims, early determination of the equitable claim might preclude relitigation of common issues before a jury. *See* 439 U.S. at 334. At the same time, the *Parklane Hosiery* Court took pains to confirm the continued viability of *Beacon Theatres'* heavy emphasis[15] on avoiding such a result wherever possible. *Id.*

Thus, *Parklane Hosiery* establishes two propositions which are critical to the case at bar: that the right to a jury trial can be lost by a prior determination of issues in a non-jury proceeding, and that courts must take pains to avoid this loss wherever possible. The significance of the first proposition is that Petitioner's putative right to a jury trial in any breach of contract action that might be brought by a vendor is purely illusory; the Secretary's factual determinations will estop Petitioners from relitigating the critical issues. The second proposition, Petitioners respectfully submit, imposes an obligation on this Court to intervene.[16]

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15. The *Beacon Theatres* Court declared, for example, that "only under the most imperative circumstances, circumstances which in view of the flexible procedures of the Federal Rules we cannot now anticipate, can the right to a jury trial of legal issues be lost through prior determination of equitable claims." 359 U.S. at 510-11.

16. It is important to remember that the line of cases on which *Atlas Roofing* relied evolved largely out of judicial sen-

(Continued on following page)

C. The Sixth Amendment.

The administrative proceedings below expose Petitioners to potential civil penalties of as much as $10,000.00 per violation, for a possible total of $530,000.00 each. The Court has consciously avoided deciding whether this sort of civil penalty counts as criminal punishment that would trigger the Sixth Amendment guarantee of a jury trial.[17] *See Atlas Roofing*, 430 U.S. at 449 & n.5. Petitioners respectfully submit that now is a good time to address that question.

(Continued from previous page)

sitivity to Congress' legitimate interest in avoiding cumbersome procedures in administrative adjudications. *See, e.g., Curtis v. Loether*, 415 U.S. 189, 194-95 (1974). Thus, *Atlas Roofing* can be conceptualized as striking a balance between Congress' interest in prescribing appropriate procedures for the adjudication of statutory rights and a litigant's claimed Seventh Amendment interest in a trial by jury. Where the rights to be adjudicated administratively are purely statutory, Congress' interest is very strong and the proper balance is easily found—witness the absence of dissent in *Atlas Roofing*. On the other hand, Congress has a weaker claim where, as in the case at bar, the administrative adjudication will decide the litigant's private contract rights vis-a-vis other private parties, and Petitioners have a commensurately stronger interest. *Parklane Hosiery*, which was decided after *Atlas Roofing*, augments Petitioners' position even more because deferring to Congress' choice of procedures would, through collateral estoppel, effectively destroy Petitioners' right to a jury trial even in a garden-variety breach of contract action between Petitioners and the meat vendors. In the circumstances of this case, therefore, the price of administrative convenience becomes prohibitively high.

17. Holding the civil penalties to be penal in nature would, of course, have other ramifications as well, such as the right to a speedy trial and the Fifth Amendment right to remain silent. *See also* U.S. Const. art. III, § 2, cl. 3.

The factors to be considered in determining whether a statute is penal are set forth in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963):[18]

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play on a finding of *scienter*, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry[.]

Id. at 168-69.

The civil penalty in the case at bar looks much like a criminal penalty in light of these factors. For example, although the penalty does not directly involve "an affirmative disability or restraint", indirectly it does. Section 195(3) of Title 7 provides for imprisonment of up to five years for failure to obey orders of the Secretary issued under Section 193, which in subparagraph (b) authorizes the civil penalty at issue.

The civil penalty here also is plainly designed to promote the "traditional aims of punishment—retribution and deterrence." To a certain extent this is true of any large fine imposed for violation of a statute, but the deterrent effect of the penalty here is specially enhanced by the

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18. *Mendoza-Martinez* also held that an adequately clear congressional intent to make a statute penal would suffice, *see id.* at 169, but the legislative history of the Packers & Stockyards Act is not helpful in that regard. *See generally Stafford v. Wallace*, 258 U.S. 495 (1922).

statutorily prescribed manner of determining what the size of the penalty should be:

> In determining the amount of the civil penalty to be assessed under this section, the Secretary shall consider the gravity of the offense, the size of the business involved, and the effect of the penalty on the person's ability to continue in business.

7 U.S.C. § 193(b). These kinds of considerations, particularly the mandatory focus on the particular circumstances of the individual being penalized, are strikingly similar to accepted sentencing considerations in traditional criminal proceedings. *See generally* 8A J. Moore, *Moore's Federal Practice* ¶ 32.04 [1].

Petitioners frankly admit that not all of the *Mendoza-Martinez* factors support their Sixth Amendment claim. *Cf. Mendoza-Martinez,* 372 U.S. at 169 (factors "may often point in differing directions"). But the enormity of the potential fines, the possibility of imprisonment that would not otherwise exist, and the care taken by Congress to ensure that the punishment fits the criminal rather than the crime are all distinctly penal.

V

CONCLUSION

We know what the law is: *Northern Pipeline* says that Article III prohibits an administrative agency from adjudicating private contract rights; *Atlas Roofing* says that the Seventh Amendment prohibits the same thing.

We also know what is going to happen despite the law: the Secretary of Agriculture will adjudicate Petitioners' private contract rights as against other private parties.

It is for these reasons that we ask the Court to grant this petition.

Dated: June 18, 1984

Respectfully submitted,

HARRISON W. HERTZBERG
MICHAEL B. MARGOLIS
Counsel of Record
KAREN MOSKOWITZ
HERTZBERG, REGELE & HERTZBERG
A Partnership Including
A Law Corporation

Attorneys for Petitioners

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 84-7022

LANDMARK BEEF PROCESSORS, INC.,
and CHAIM TREIBATCH,

Petitioners,

vs.

SECRETARY OF AGRICULTURE and THE
UNITED STATES DEPARTMENT OF
AGRICULTURE,

Respondents.

ORDER

(Filed March 20, 1984)

Before: SCHROEDER, FARRIS and CANBY,
Circuit Judges

Petitioners' application for a writ of prohibition to terminate administrative proceedings is denied.

P. & S. Docket No. 6174

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:

Landmark Beef Processors, Inc.,
John M. Burbank,
Alan Silverberg,
Ronald Hillman and
Chaim Treibatch,
Respondents.

Complaint and Notice of Hearing
(Received July 26, 1983)

There is reason to believe that the respondents named herein have wilfully violated the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), and, therefore, this Complaint and Notice of Hearing is issued alleging the following:

I

(a) Landmark Beef Processors, Inc., hereinafter referred to as respondent Landmark Beef Processors, is a corporation whose business mailing address is 3163 E. Vernon Avenue, Los Angeles, California 90058.

(b) Respondent Landmark Beef Processors is, and at all times material herein was:

(1) Engaged in the business of manufacturing or preparing meat and meat food products for sale or shipment in commerce;

(2) A packer within the meaning of and subject to the provisions of the Act.

(c) John M. Burbank, hereinafter referred to as respondent Burbank, is an individual whose mailing address is 1840 Brookdale Avenue, La Habra, California 90631.

(d) Respondent Burbank is, and at all times material herein was:

(1) President of Landmark Beef Processors and a principal owner of the stock of Landmark Management Company, a holding company which owns 100% of the stock of the corporate respondent;

(2) With Alan Silverberg, Ronald Hillman and Chaim Treibatch, responsible for the management, direction and control of the policies and practices of respondent Landmark Beef Processors; and

(3) A packer within the meaning of and subject to the provisions of the Act.

(e) Alan Silverberg, hereinafter referred to as respondent Silverberg, is an individual whose mailing address is 5531 Aura Avenue, Tarzana, California 91356.

(f) Respondent Silverberg is, and at all times material herein was:

(1) Vice-President of Landmark Beef Processors and a principal owner of the stock of Landmark Management Company, a holding company which owns 100% of the stock of respondent Landmark Beef Processors;

(2) With John Burbank, Ronald Hillman and Chaim Treibatch, responsible for the management, direction and control of the policies and practices of respondent Landmark Beef Processors; and

(3) A packer within the meaning of and subject to the provisions of the Act.

(g) Ronald Hillman, hereinafter referred to as respondent Hillman, is an individual whose mailing ad-

dress is 19120 Menard Place, Tarzana, California 91356.

(h) Respondent Hillman is, and at all times material herein was:

(1) Secretary of Landmark Beef Processors and a principal owner of the stock of Landmark Management Company, a holding company which owns 100% of the stock of respondent Landmark Beef Processors;

(2) With respondents John Burbank, Alan Silverberg and Chaim Treibatch, responsible for the management, direction and control of the policies and practices of respondent Landmark Beef Processors; and

(3) A packer within the meaning of and subject to the provisions of the Act.

(i) Chaim Treibatch, hereinafter referred to as respondent Treibatch, is an individual whose mailing address is 17211 Rancho Street, Encino, California 91316.

(j) Respondent Treibatch is, and at all times material herein was:

(1) Chief Financial Officer of Landmark Beef Processors and a principal owner of the stock of Landmark Management Company, a holding company which owns 100% of the stock of the corporate respondent;

(2) With respondents John Burbank, Alan Silverberg and Ronald Hillman, responsible for the management, direction and control of the policies and practices of the corporate respondent; and

(3) A packer within the meaning of and subject to the provisions of the Act.

II

(a) Respondent Landmark Beef Processors under the management, direction and control of respondents

Burbank, Silverberg, Hillman and Treibatch, on or about the dates and in the transactions set forth below, purchased meat and meat food products and failed to pay, when due, the full purchase price for such meat and meat food products.

Date of Purchase 1981	No. Pounds	Purchased From	Purchase Price
Nov. 25	30381	Magic Valley Pkg. Co.	$28,861.95
Nov. 25	33212	Shamrock Meats, Inc.	25,500.38
Nov. 27	40353	Bartels Meat Co., Inc.	30,524.38
Nov. 27	109316	Shamrock Meats, Inc.	83,970.87
Nov. 30	41595	Orvis Bros. & Co.	34,555.00
Dec. 1	510	Diamond Meat Co.	561.00
Dec. 1	41331	Idaho Meat Packers	31,512.00
Dec. 1	25309	Los Banos Abattoir Co.	19,456.25
Dec. 1	14002	Magic Valley Packing Co., Inc.	13,301.90
Dec. 2	45138	DeJong Packing Co.	34,204.51
Dec. 2	40213	Ferry Bros. Inc.	38,112.75
Dec. 2	127004	Magic Valley Packing Co., Inc.	121,923.84
Dec. 2	19537	Orvis Bros. & Co.	15,043.49
Dec. 7	44192	Black Hills Packing Co.	33,585.92
Dec. 3	42816	Ferry Bros. Inc.	32,418.73
Dec. 3	41657	Orvis Bros. & Co.	32,163.74
Dec. 3	134802	Shamrock Meats, Inc.	102,627.15
Dec. 4	23744	Arizona Beef Co.	17,953.32
Dec. 9	44334	Black Hills Pkg. Co.	33,234.57

Date of Purchase 1981	No. Pounds	Purchased From	Purchase Price
Dec. 4	33657	Diamond Meat Co.	32,647.29
Dec. 4	34999	Hohener Meat Co.	28,138.03
Dec. 4	83108	Schenk Pkg. Co., Inc.	62,632.21
Dec. 4	33950	Bartels Meat Co.	25,609.57
Dec. 7	48315	Dairy Valley Meat	36,719.40
Dec. 7	93760	Diamond Meat Co.	90,947.20
Dec. 7	39588	Idaho Meat Packers	29,978.59
Dec. 7	34303	E.A. Miller & Sons	25,801.28
Dec. 7	42782	Orvis Bros. & Co.	32,547.77
Dec. 7	16845	Shamrock Meats, Inc.	12,802.20
Dec. 8	50647	Dairy Valley Meats, Inc.	38,998.19
Dec. 8	58761	Diamond Meat Co.	56,998.17
Dec. 8	2410	Ferrara Meat Co., Inc.	2,313.60
Dec. 8	33204	Los Banos Abattoir Co.	24,491.84
Dec. 8	42119	Washington Beef Producers	40,013.05
Dec. 9	51934	Dairy Valley Meats, Inc.	39,170.62
Dec. 9	31172	Diamond Meat Co.	30,236.84
Dec. 9	42583	Flanery Foods, Inc.	32,363.08
Dec. 9	19120	Orvis Bros. & Co.	14,840.82
Dec. 9	19378	Shamrock Meats, Inc.	13,696.08
Dec. 10	40826	Arizona Beef Co.	30,939.74
Dec. 10	42051	Bartels Meat Co., Inc.	31,440.87
Dec. 10	26514	Dairy Valley Meat, Inc.	20,125.56

Date of Purchase 1981	No. Pounds	Purchased From	Purchase Price
Dec. 10	29845	Diamond Meat Co.	28,949.65
		adjustments for prior invoices	3,741.85
Dec. 10	42857	Orvis Bros. & Co.	32,593.83
Dec. 10	30911	Shamrock Meats, Inc.	23,476.10
Dec. 11	45831	Dairy Valley Meats, Inc.	34,827.76
Dec. 11	37169	Dubuque Pkg. Co.	27,028.21
Dec. 11	23765	Shamrock Meats, Inc.	16,840.93
Dec. 12	38450	Sunflower Beef Packers, Inc.	40,372.50
Dec. 14	32780	Dairy Valley Meat, Inc.	23,273.80
Dec. 14	46299	Orvis Bros. & Co.	34,116.99
		adjustments for prior invoices	145.37
Dec. 15	28986	Dairy Valley Meat, Inc.	20,543.14
Dec. 15	21382	Los Banos Abattoir & Co.	15,146.50

(b) As of June 17, 1983, there remained unpaid in excess of $1,775,000.00 for meat and meat food products purchased by respondent Landmark Beef Processors, Inc.

III

By reason of the facts alleged in paragraph II, respondents Landmark Beef Processors, Burbank, Silverberg, Hillman and Treibatch have wilfully violated section 202(a) of the Act (7 U.S.C. § 192(a)).

WHEREFORE, it is hereby ordered that for the purpose of determining whether the respondents have in fact wilfully violated the Act, this Complaint and Notice of Hearing shall be served upon the respondents. Respondents shall have twenty (20) days after receipt of this Complaint and Notice of Hearing in which to file an an-

swer with the Hearing Clerk, United States Department of Agriculture, Washington, D.C. 20250, in accordance with the Rules of Practice governing proceedings under the Act (7 CFR § 1.130 *et seq.*) Failure to file an answer shall constitute an admission of all the material allegations of this Complaint and Notice of Hearing unless the parties have agreed to a consent decision pursuant to section 1.138 of the Rules of Practice (7 CFR § 1.138). Respondents are hereby notified that unless hearing is waived, either expressly or by failure to answer and request a hearing, a hearing for the above-mentioned purpose will be held at a place and date to be specified later. At such hearing, respondents will have the right to appear and show cause why an appropriate order should not be issued in accordance with the provisions of the Act, requiring the respondents to cease and desist from violating the Act with respect to the matters alleged herein, and assessing such civil penalties as are authorized by the Act and warranted in the premises.

Done at Washington, D.C.
this 26th day of July 1983

/s/ B. W. Jones
Administrator, Packers and
Stockyards Administration

ALLAN R. KAHAN
Attorney for Complainant
Telephone: (202) 447-8160
(202) 447-5293